70-316

Supreme Court, U.S.
FILED
JUN 21 1971
E. ROBERT SEAVER, CLERK

UNITED STATES SUPREME COURT

WASHINGTON, D.C.

[redacted]

GABRIEL NICOLAS and wife,
ELENA NICOLAS,

Petitioners,

-vs-

JAMES B. McINTYRE, Trustee,
et al.,

Respondents.

APPLICATION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES SUPREME COURT

WASHINGTON, D. C.

GABRIEL NICOLAS and wife, ELENA NICOLAS, Petitioners,	)	
VS.	)	No. _____
JAMES B. McINTYRE, Trustee, et al., Respondents.	)	

APPLICATION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT:

GABRIEL NICOLAS and wife submit the following application for review of a judgment entered by a State of Texas District Court in El Paso County, Texas, 41st Judicial District, and affirmed by the Court of Civil Appeals, Eighth Supreme Judicial District and on application for writ of certiorari to the Supreme Court of the State of Texas, said petition was denied.

This Court has jurisdiction of this matter under 28 USCA Section 1257 (3).

This judgment was entered on the 17th day of April, A. D. 1970.

The application for writ of certiorari was refused by the Supreme Court of Texas on the 10th day of February, 1971 and the date of the order denying a rehearing was entered on March 24, 1971.

This Court is conferred jurisdiction to review the judgment in question by writ of certiorari by Rule 19 of the Supreme Court of the United States Section 1 (b): "Where a court of appeals has rendered a decision.... which has so far departed from the accepted and usual course of judicial proceedings..."

The question presented for review is whether or not a Court can grant summary judgment which takes property without notice. In the State of Texas there is a procedure whereby a trustee can sell real property without notice to the grantor.

The property is sold to a third party but if a balance is owing then it is deeded to a trustee merely to secure the debt.

If the grantor has notice of a purported notice of sale he can enjoin by petition stating that the property is about to be sold and will be sold unless injunction issues. In our case the lawyer for the purchasers had himself named trustee and posted the property for sale alleging default. The owners of the property hearing of the threats to sell, were granted an injunction against the sale of the property upon posting of a $250.00 bond. Suit was filed by the property owners alleging no default.

The attorney-trustee told the attorney for the owners that there would be no sale, but immediately posted the property for sale without notifying the owners or the attorney. If they had known, they could have asked for an injunction to prevent the sale until hearing their cause of action in which they maintained they were not in default.

The attorney-trustee sold the property without any notice to either the owners or the owners' attorney, and as attorney for the new buyers demanded possession of the property.

This decision of the Court was in a lawsuit which the owners filed to set aside the deed as fraudulent and the court granted summary judgment. If permitted to stand, this judgment will deprive the owners of their property without due process of law in violation of the 14th Amendment of the Constitution of the United States.

Rule 166-A is the Summary Judgment Law in Texas. It states: "(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least ten days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. No oral testimony shall be received at the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn

or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt. Promulgated by order of October 12, 1949, effective March 1, 1950. As amended by orders of October 10, 1951, effective March 1, 1952, and July 20, 1966, effective January 1, 1967."

The question presented is: Can this Rule be utilized to deprive a citizen of his property without a trial by jury? There was a suit already pending in which the issues were whether there was default in payment and whether the deed should be set aside for fraud.

The Court granted summary judgment based on Rule 166 (a) and affirmed the sale of real property in a non-judicial sale in which the property was posted for sale without notifying the parties to the lawsuit that the notices were posted and the property would be sold. This was done so that the remedy of injunction would not be resorted to.

Therefore the question is: Is a State rule which

provides for summary judgment without notice to a property owner constitutional in the face of the prohibition of the 14th Amendment against taking property without due process of law?

The 14th Amendment of the Constitution of the United States is so well known that setting out verbatim is not deem necessary.

There are appendixed to this petition a copy of the opinion entered by the Court of Civil Appeals and from which writ of error was denied by the Supreme Court of the State of Texas.

Respectfully submitted,

GABRIEL NICOLAS, Petitioner

ELENA NICOLAS, Petitioner

I hereby certify that on this the 18 day of June, A. D. 1971, I mailed copies of the foregoing application to Mr. Ellis O. Mayfield, Attorney for James B. McIntyre at Suite 525, Southwest National Bank Building, El Paso, Texas 79901, and to Mr. W. C. Peticolas, Attorney for DeWitt and Rearick, at Suite 12-E, El Paso National Bank Building, El Paso, Texas 79901.

JOSEPH J. REY
Attorney for Petitioners

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Court of Civil Appeals

El Paso

GABRIEL NICOLAS, et ux.,

Appellants,

-vs-

JAMES B. McINTYRE, Trustee, et al.,

Appellees.

No 6131

Appeal from the District Court of

El Paso County

OPINION

The nature of the case as stated by the plaintiff-appellants is as follows: This suit was brought by the plaintiffs, Gabriel Nicolas and wife Elena G. Nicolas, appellants, against defendants Ira Q. Mayhew, Mina Lou Mayhew Brady, Robert T. Schwarzbach, Trustee, James B. McIntyre, Trustee, and DeWitt and Rearick, Inc., to cancel trustee deed on the ground of constructive fraud. James B. McIntyre, Trustee, and DeWitt and Rearick, Inc. filed their motions for summary judgment, which were granted. The court having rendered judgment granting the motions for summary judgment, the appellants are prosecuting their appeal to this court.

It appears from the affidavit of James B. McIntyre that appellants executed a deed of trust on February 23, 1962, to Robert T. Schwarzbach, as trustee, covering Lots 25 and 26 in Block 1, Alamo Heights, a subdivision in the City of El Paso, El Paso County, Texas, to secure Ira Q. Mayhew and Mina Lou Mayhew Brady, beneficiaries, in the payment of a promissory note of even date in the principal sum of $10,500.00 payable in monthly installments of $115.00, the first installment being due on or before April 1, 1962 and a like installment due on the same day of each succeeding month thereafter until said note was paid in full. As time went on, in 1969 the appellants became delinquent in their payments, and the owners of this note and the beneficiaries of the deed of trust, acting through their attorney, a Mr. Carrithers of Houston, Texas,

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engaged the law firm of Mayfield, Broaddus and Perrenot concerning foreclosure by deed of trust sale on the subject property due to the said delinquencies. The note at that time was held for collection by the real estate note collection department of the State National Bank of El Paso, Texas. It appears that in his affidavit Mr. McIntyre, of the said law firm, stated that he contacted Nancy Ellen Byrum, of the real estate note collection department of the said Bank, and was told that no monthly payments had been received for September, October or November, 1969. Mr. McIntyre further stated that he picked up the note on November 13th and wrote a demand letter to Mr. Gabriel Nicolas and Mrs. Elena G. Nicolas at their address; that on November 17th he received a telephone call from a Mr. Arievas, speaking for Mr. Nicolas, and was informed by Mr. Arievas that I (Mr. McIntyre) understood the note to be delinquent by three payments for a total delinquency of $345.00; Mr. McIntyre stated that on November 19th he received a telephone call from the American Furniture Credit Union stating that it had approved a loan to Mr. Nicolas in the sum of $385.00. Mr. McIntyre stated that he accepted the money and credited the Nicolas account with $345.00, retaining $40.00 for attorneys' fees, and returned the note and deed of trust to the State National Bank of El Paso.

Mr. McIntyre further states in his affidavit that he was advised on December 9th, by the Mayhew attorney, Mr. Carrithers, that they were under the impression that the note was more seriously in default than was represented by Mr. McIntyre's collection of three payments on November 9th. Upon investigation he was advised by the State National Bank, speaking through Nancy E. Byrum, that a posting error had been made in the ledger of one year, and that at the time of the transaction regarding the $385.00 payment, Mr. and Mrs. Nicolas were in default of fifteen months, instead of

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three months. He then wrote to Mr. and Mrs. Nicolas informing them of the bank's posting error and the serious delinquency of the note, and demanded payment for all delinquencies and interest and attorneys' fees by Monday, December 15th, and informed them that unless this was done the entire indebtedness would mature, and notice of trustee's sale would be posted on that day for the purpose of foreclosing the deed of trust lien against the real estate. On December 12, 1969 he again picked up the note and deed of trust from the bank, and on December 15th, Gabriel Nicolas and his sister came to his office to discuss the payment of the delinquency and the pending foreclosure, at which time Mr. Nicolas stated that he did not have the deficiency balance and asked for more time. Mr. McIntyre informed Mr. Nicolas that he would proceed to have the trustee in the deed of trust post notices of trustee's sale and conduct the sale on the first Tuesday of January, being January 6th. Mr. Schwarzbach posted the notices in three public locations. Mr. McIntyre then wrote the owners of the note and informed them of Mr. Nicolas' request for an extension of time and requested that he (Mr. McIntyre) be named as trustee to succeed Mr. Schwarzbach. He then wrote Mr. Nicolas that the foreclosure proceedings had begun and unless he could raise the sum of $1,573.24 on or before January 6, 1970, the deed of trust would be foreclosed. He also recommended to Mr. Nicolas that an attempt be made to refinance the property through some of the local savings and loan associations. He later received a letter from attorney Carrithers and documents establishing him as successor trustee to Robert T. Schwarzbach. Mr. McIntyre stated that in his letter Mr. Carrithers said that it was agreeable with the owners of the note that Mr. Nicolas be allowed a thirty-day extension beginning January 1st to either sell the house or refinance the loan. On January 5th he received a telephone call from Mr. Joseph J. Rey, Sr., attorney representing Mr. Nicolas, in which Mr. McIntyre assured Mr. Rey that there was

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not going to be a sale "tomorrow, January 6th", but that the owners had given his clients a thirty-day extension, from January 1st, in order that he might attempt to sell the house or refinance the loan. On January 9th, Mr. McIntyre stated that he received a letter from Mr. Rey with his check for $115.00 enclosed, requesting that said check be creditedto the Nicolas account and again referring to the assurance to Mr. Rey that Mr. and Mrs. Nicolas had until the end of January either to refinance or to sell the house. On January 9th Mr. McIntyre says he replied to Mr. Rey's letter acknowledging receipt of the check for $115.00 which was credited to the oldest mortgage debt of Gabriel Nicolas, which was January, 1969. He also told Mr. Rey that if Nicolas could raise enough money to take care of all deficiencies and legal expenses and any delinquent taxes by the first Tuesday in February, 1970, it was conceivable that the owness of the note might agree to drop the foreclosure.

He further stated that he was never contacted by either Mr. Rey or his client, Mr. Gabriel Nicolas and Mrs. Elena G. Nicolas, during this thirty-day extension, which expired on January 31st. Nothing was said to him in writing in any way with regard to the payment of the twelve months' deficiency, refinancing of the loan, or sale of the property; so on February 3rd the property was accordingly sold to DeWitt and Rearick for the sum of $8,600.00.

None of the above statements is contradicted in any way by the deposition of Mr. Nicolas. He admitted that he knew he was in default and that he could not raise the money. We do not find a single material dispute in this record. Everything that Mr. McIntyre stated in his affidavit was either not denied or was flatly admitted by Mr. Nicolas' deposition.

The appellants' position tries to set up and allege some sort of constructive fraud, presumably because Mr. McIntyre accepted the check for $115.00. We do not see any fraud in this, as it would

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be only one month's payment, for the month of January, which was the extension month. In Hazle v. McDonald, 449 S.W.2d 343 (Civ. App., Dallas 1969), no writ history, an action for fraudulent misrepresentations, the court stated:

> "Fraud is never presumed. It has been said that it is the duty of the court 'to presume a want of fraud rather than the existence of fraud in a transaction,' Hawkins v. Campbell, 226 S.W.2d 891, 895 (Tex.Civ.App., San Antonio 1950, writ ref'd n.r.e.)."

From the affidavits and controverting affidavits, it appears very clear that the only serious mistake was that made by the bank in stating that Mr. Nicolas was three months in default, when he was in fact fifteen months in default. After paying up his three months' default, it was discovered that the bank was in error and the note was actually fifteen months in default and, after the payment of $385.00, remained twelve months in default. As stated in Mr. McIntyre's affidavit (and not denied in Mr. Nicolas' deposition or any other document), the owners agreed that Mr. Nicolas would have thirty days beginning January 1st to either sell or refinance the house, and the possibility was held out that if he were able to pick up all deficiencies of any sort, they might abandon the foreclosure. During the time from January 9, 1970 until the foreclosure of February 3, 1970, Mr. McIntyre, nor the noteholders nor their attorney, received any word or payment or promise of some form from Mr. and Mrs. Nicolas.

We have examined the deposition and documents submitted by the appellants and do not find any clear contradiction or statement of fact contrary to the matters set out by the appellees. Such being the case, appellees are entitled to summary judgment. Kuper v. Schmidt, 338 S.W.2d 948 (Tex.Sup.Ct., 1960); West Coast Min., Inc. v. Security Nat. Bank of Lubbock, 442 S.W.2d 821 (Civ.App., Amarillo 1969, ref. n.r.e.); Hazle v. McDonald (supra). As stated before,

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El Paso

there is no material fact dispute existing in this record. We do not see how there could be any constructive fraud, as Mr. and Mrs. Nicolas were twelve months in arrears after they had made their $365.00 payment and after they had made their $115.00 payment in January, 1970.

Finding no material dispute in fact, we hold that the court's decision was correct, and it is therefore affirmed.

/s/ Alan R. Fraser

Alan R. Fraser, Chief Justice

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IN THE SUPREME COURT OF TEXAS

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February 10, 1971

No. B-2477.

Gabriel Nicolas et ux.
vs.
James B. McIntyre, Trustee, et al.

From El Paso County, Eighth District.

Application of petitioners for writ of error to the Court of Civil Appeals for the Eighth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicants, Gabriel Nicolas et ux.,

pay all costs incurred on this application.

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March 24, 1971

No. B-2477.

Gabriel Nicolas et ux.
vs.
James B. McIntyre, Trustee, et al.

From El Paso County, Eighth District.

Petitioners' motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

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I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 25th day of May, 1971.

GARSON R. JACKSON, Clerk

By Eugene Cervenka, Deputy.
Eugene Cervenka